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No. 71-814

In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID B. CORTRIGHT, PETITIONER

v.

ROBERT F. FROEHLKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	10
Conclusion	12

CITATIONS

Cases:

Dash v. *Commanding General*, 307 F. Supp. 849, affirmed, 429 F. 2d 427, certiorari denied, 401 U.S. 981 — 11

Noyd v. *Bond*, 395 U.S. 683 — 11

Constitution and Statutes:

Constitution of the United States:

First Amendment — 2, 8, 10, 11

Uniform Code of Military Justice, Article 138, 10 U.S.C. 938 — 3, 7

456-350—72

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OPINIONS BELOW

The opinion of the district court (Pet. 30a–58a) is reported at 325 F. Supp. 797. The opinion of the court of appeals (Pet. 1a–29a) is reported at 447 F. 2d 245.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1971. On November 16, 1971, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to December 18, 1971, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the transfer of a soldier from one domestic post to another violated his First Amendment rights when the military authorities had determined in good faith that the transfer was required because the soldier's anti-war protest activities were impairing the ability of his unit properly to perform its duties.

STATEMENT

1. After receiving an induction notice, petitioner enlisted in the Army in August 1968 for three years under an agreement that he would be assigned to the 26th Army Band at Fort Wadsworth, New York, for a minimum of one year following basic training (Tr. 7–8, 41–42).[1] The duties of that band (R. 385) are:

> a. To promote and maintain the morale and esprit-de-corps of the troops by providing appropriate music for military ceremonies, concerts, entertainment and recreational activities.
>
> b. To assist in maintaining an effective community relations program through participation in suitable local events.
>
> c. To support the Army Recruiting Program by performing at senior high schools and colleges.

In addition, the band had the general Army responsibility to be "able to fight and be able to defend vital

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[1] "Tr. ——" refers to the transcript of the trial. Other references are to trial exhibits: the record of the Army's investigation under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938 (cited "R. ——"); the July 17, 1970, letter from General Higgins to General Seaman ("Higgins Letter ——"), and the depositions of General Higgins ("Higgins Dep. ——") and Warrant Officer Flores ("Flores Dep. ——").

installations and be responsive immediately to orders without any question" (Tr. 224). Further, although the members of the band enjoyed some privileges such as exemption from KP and guard duty (Tr. 261; Flores Dep. 75), in general they were expected to meet Army standards of conduct and appearance and to fulfill such aspects of military life as policing the parade ground (R. 348, 373).

The band's authorized membership of 64 was reduced to 42 effective May 1970 (Higgins Dep. 9–12). The actual number of men assigned to the band gradually decreased from about 70 in January 1970 to 50 in October 1970 (Flores Dep. 52–54). Approximately 23 members of the band were transferred to other posts during this period (Flores Dep. 54).

2. On November 9, 1969, a petition signed by 1,366 servicemen was published in the *New York Times* protesting United States involvement in Vietnam and urging participation in a demonstration in Washington, D.C. (Complaint Exhibit A). Cortright had initiated and led the distribution of this petition at Ft. Wadsworth. He testified that he obtained the petition from a civilian organization, brought it to the Army base, discussed it with 90 percent of the band in groups of up to ten persons on post, and obtained 39 signatures through the month of October 1969 (Tr. 11–13, 42, 47). The Army took no action against those who signed the petition (Tr. 15–16).

The following spring, Cortright was again the "moving and motivating force behind the circulation" (Tr. 48) of a similar petition. Here, too, Cortright's

activity relating to the petition occurred both on and off post (R. 59, 141, 200). The petition generated much discussion among the band. Cortright and Acting Sergeant Sicola, the spokesman for those opposing the petition, conducted a meeting in the band's rehearsal hall which was attended by most of the band members except career personnel, who were either excluded or uninvited (R. 229). At the conclusion of the meeting, it was agreed that if a majority of the band opposed the petition, it would be withdrawn (Tr. 20–21). The bandmaster, Chief Warrant Officer Flores, then told the band that if they wanted to sign a petition as individuals they could, but it was "very unwise" (Tr. 23) to "have the unit involved in something like this" (Flores Dep. 19). Following this meeting, Cortright polled the band and found a majority opposed to the petition, which was withdrawn (Tr. 24).

A day or two prior to the 1970 Fourth of July parade on Staten Island in which the band was scheduled to participate, Cortright learned from another band member that the wives of some of the members intended to demonstrate at the parade against the war (Tr. 26). Cortright told his fiancee to speak to one of the wives about getting involved in the demonstration (Tr. 26). The band was in formation awaiting the start of the parade when the demonstration began (Tr. 27). Cortright's fiancee and four wives of band members appeared carrying signs such as "Military Wives For Peace" (Tr. 166). The women tried to march alongside the band and stated that they were related to band members (Flores Dep. 32–33).

The parade marshals refused to allow the women to march in the parade without the required permit, but they were permitted to march behind the parade (Tr. 170). The civilian crowd and at least one civilian parade participant reacted hostilely. Cortright's fiancee was hit by a thrown object, one veteran hit another woman, and the crowd tore up their signs (Tr. 169). The incident was reported in the local paper in an article which identified the women as wives and a fiancee of the band members (R. 398).

3. On July 8, 1970, Flores announced ten specific changes in the band's duties, including extension of duty hours to an eight-hour day, mandatory attendance at Ft. Wadsworth reveille, police call for the entire band, and the termination of Army-financed private music lessons during duty hours. Cortright and some of the other band members wrote a letter to the commanding general of Fort Wadsworth, urging that these changes be rescinded (R. 368). In response, Colonel Merrick, the deputy commander of the post, addressed the band. He stated that the members' anti-war activities were protected and that Flores should be reprimanded for relating the changes to their protest activities (R. 348). Colonel Merrick refused to rescind the changes, however, on the ground that the new requirements were part of a soldier's normal duties and should have been performed all along (Tr. 246–267).

The foregoing events had a significant impact upon the band. Cortright described the band as "stunned" (Tr. 32); Windham, the band's director, testified that the band "cease[d] to function as a musical unit" and

that they "simply went about [their] tasks in a mechanical way" (Tr. 66–67). Windham believed that attending reveille was a "hardship" and that wearing a fatigue uniform was "psychologically a hardship" (Tr. 72). Brooks, who did not object to wearing fatigues (Tr. 87), regarded working an eight-hour day as an "extreme change" (Tr. 85). Flores stated that immediately after the changes were made, Cortright told him the band was "polarized" and that one band member had swung at another (R. 126).

Flores himself believed his unit was "polarized" (R. 127). Other band members agreed. Anderson felt that the band was "split into two groups" as a result of the petition, and that "[t]here was a great deal of [dissension] in the unit at that time" (R. 44–45). Anderson knew Cortright "didn't care for the commander" (R. 44). Miranda applied for a transfer out of the band because he "did not approve of what was going on in the band from both sides" (R. 187). Smith joined the band on July 13, 1970, and "found out that there was trouble" (R. 239).

Upon the recommendation of the commanding general of the post (Tr. 230, 272–273), General Ciccolella, the Chief of Staff of the First United States Army at Ft. Meade, Maryland, then directed that Cortright be transferred. In testimony which the district court characterized as "absolutely honest" (Tr. 391), General Ciccolella stated (Tr. 223–224):

> The issue that I was confronted with and the reason I took the action I did was not based on any of his ideas on dissent. It was based on his activities in the band.

> Q. What were his activities in the band?
>
> A. He was fostering a general attitude of dissension, a general attitude of unresponsiveness to good order and discipline, and unresponsiveness of the unit to accomplish its mission.
>
> It raised serious doubts in my mind that this band could accomplish its mission.

After so concluding, General Ciccolella ascertained that the band was overstrength and that Cortright was eligible for transfer (Tr. 219). In directing the transfer, General Ciccolella intended to improve the band, not to punish Cortright (Tr. 220).

On July 17, 1970, petitioner was ordered transferred from the 26th Army Band at Fort Wadsworth to the 62nd Army Band at Fort Bliss, Texas (Tr. 35, 49).

4. Cortright filed an administrative complaint on July 22, 1970 (R. 290),[2] and instituted this action the following day. An officer from Ft. Meade, Maryland, conducted an investigation and concluded that the July 8th changes in the band's duties "were made for the purpose of improving the military efficiency of that unit, and that such changes were in the best interest of the unit and the United States Army" (R. 275). He also found that Cortright's transfer

[2] The complaint was filed under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938. Article 138 permits any member of the armed forces "who believes himself wronged by his commanding officer" to complain to a superior officer, and requires that such complaint be investigated and that "proper measures" be taken "for redressing the wrong complained of."

"was essential to the continued effective performance of the community relations mission of the 26th Army Band, and that such transfer was not punitive in nature" (*ibid*). After further investigation, the Judge Advocate General's Office approved these findings on behalf of the Secretary of the Army (R. 2).

While at Fort Bliss, petitioner continued to engage in activities protesting American involvement in Vietnam (Tr. 49–53).

Upon completing his three-year enlistment in the summer of 1971, petitioner was separated from the Army (Pet. 11).

5. Petitioner's suit in the district court was brought as a class action on behalf of all members of the 26th Army Band (Pet. 30a, 37a). It sought a declaratory judgment that the Army's actions in imposing the new duties on the band and in transferring petitioner and several other soldiers were invalid, a cancellation of the order transferring petitioner to Fort Bliss and an injunction against future transfers "without good cause shown" (Pet. 30a). Five other band members who had been ordered transferred to Vietnam and Korea were permitted to intervene (Pet. 36a).

After a trial, the court upheld the transfer of those five soldiers (Pet. 36a–37a), but held that the transfer of petitioner violated his First Amendment rights (Pet. 53a–56a).[3] The court rescinded the order trans-

[3] The district court also held that in transferring petitioner the Army violated its own regulations (Pet. 56a). The court of appeals ruled (Pet. 12a–13a), however, that the regulations upon which the district court relied were designed for the benefit of the Army and not for that of servicemen.

ferring petitioner to Fort Bliss; directed his return to the 26th Army Band and reinstatement to his former duties; prohibited his transfer from the latter unit "for the proper exercise of his right to free speech"; and ordered the military to post on the bulletin boards utilized by the 26th Army Band copies of the Army's current guidelines regarding dissent and a one-page statement of the facts and conclusions of the litigation.

The court of appeals (Judge Oakes dissenting) reversed. In an opinion by Chief Judge Friendly, the court stated (Pet. 20a):

> [W]e are far from holding that under no circumstances could a civilian court interfere with a transfer order or prescribe other relief if that were needed to prevent abridgement of a soldier's First Amendment rights. We hold only that the Army has a large scope in striking a proper balance between servicemen's assertions of the right of protest and the maintenance of the effectiveness of military units to perform their assigned tasks—even such a relatively unimportant one as a military band's leading a Fourth of July parade, and that its actions here did not overstep these bounds. * * *

Earlier in its opinion, the court had stated that it viewed the "First Amendment elements of the case" as "considerably less portentous" than the district court did (Pet. 13a) and that petitioner's activities "went beyond rights accorded him by the First [Amendment]" (Pet. 18a).

ARGUMENT

1. Petitioner's principal contention is that his transfer from the band at Fort Wadsworth to the band at Fort Bliss was improper because it resulted from the exercise of his First Amendment rights in protesting American involvement in Vietnam. Any issue with respect to that transfer is now moot, however, since petitioner has completed his military service and has been separated from the Army (Pet. 11). Although petitioner sought to maintain this suit as a class action on behalf of all members of the band, the district court permitted it as a class action only with respect to the changes in the band's duties (Pet. 37a–38a). With respect to the transfers of the band members, the suit was limited to the members actually transferred (Pet. 38a). The district court upheld the transfers of the five other members of the band who had intervened, and they did not appeal that ruling. There is thus no longer any live controversy with respect to the only transfer whose validity was litigated in the court of appeals.

In any event, the present suit would be an inappropriate vehicle for resolving the broad constitutional issues that petitioner raises. Petitioner himself recognizes (Pet. 22) that the military authorities "have a discretionary authority to transfer their personnel wherever they choose"; and on the other hand, the court of appeals twice stated (Pet. 2a, 20a) that cases might arise in which a civilian court properly could set aside a military transfer order. The propriety of such orders and the role of the courts in reviewing them, however, necessarily turn upon the facts of the

particular case. The reconciliation of servicemen's First Amendment rights and the military's broad discretion to assign its personnel and to take appropriate steps to maintain the effectiveness, discipline and morale of its units must accordingly be accomplished on a discriminating and individualized basis, and not in terms of broad generalizations unrelated to particular cases.

2. The court of appeals correctly concluded that in the particular circumstances of this case the Army's transfer of petitioner from a band in New York to a band in Texas did not violate his First Amendment rights. "In reviewing military decisions, [civilian courts] must accommodate the demands of individual rights and the social order in a context which is far removed from" those encountered in civilian litigation. *Noyd* v. *Bond*, 395 U.S. 683, 694; *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. Here the military authorities concededly acted in the good faith belief that Cortright's transfer was in the best interests of the Army (Pet. 17a, 32a). As discussed in the Statement, the record amply supports their conclusion that Cortright's continued presence in the 26th Army Band was impairing the ability of that unit to perform its missions.

The record adequately answers petitioner's claim (Pet. 22–23, 26) that his transfer was punitive. It was not intended as punishment (Tr. 220), and the "lack of any vindictiveness" (Pet. 17a) is confirmed by the fact that Cortright was merely reassigned from the 26th Army Band in New York to the 62nd Army

Band in Texas. In reducing the New York band to its authorized strength, many members were transferred. Cortright's continued protest activity at Fort Bliss (Tr. 49–53) shows that the transfer did not chill any of his protected rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972